



City of Seattle
Office of the Mayor

March 5, 2013

Peter Holmes, City Attorney
Jean Boler, Civil Division Chief
Seattle City Attorney's Office

Dear Pete and Jean,

Recent communications between our offices reflect a fundamental disagreement about the role and authority of the City Attorney. This disagreement has persisted for several years, and it has significant consequences for City government. We believe it is in the best interests of the City to resolve this issue, one way or the other, and we would like to propose a path to do that.

First, I want to review the recent events in detail, because they provide a good illustration of the problems that arise from inconsistent views as to the role of your office.

The City entered a comprehensive Settlement Agreement with the United States Department of Justice on August 27, 2012. Merrick Bobb was appointed to monitor the agreement on October 30, 2012. The Settlement Agreement provides that "[w]ithin 120 days of the Monitor's appointment [February 27], the Monitor will develop a monitoring plan ... and will submit it to the parties for review and approval." "If the Parties do not agree on a Monitoring Plan, all policies and procedures will be developed within 180 days of the Effective Date of [the] Agreement and all training curricula will be developed within one year of the Effective Date."

By the plain language of the agreement, a Monitoring Plan can only be adopted by agreement of the parties. The Monitor does not have authority under the Settlement Agreement to unilaterally decide a plan. If there is no agreed-upon plan, the parties default to deadlines set by the Agreement. While the Agreement provides a deadline for the Monitor's submission of a plan to the parties, it does not provide a deadline for agreement on the plan, or a requirement that it be approved by the Court.

The Monitoring Plan is to "clearly delineate the requirements of the Settlement Agreement to be assessed for compliance," and "set out a schedule for a compliance review or audit of each requirement." Mr. Bobb provided us with a proposed monitoring plan on February 1. As you recognized, Mr. Bobb's proposal deviated from the Settlement Agreement in significant ways. You advised us that:

The Monitor's draft plan does not track the settlement agreement in that it characterizes a number of things as "requirements" that are not requirements and does not provide specifics on core requirements that are in the Settlement Agreement.

Your office provided a 13-page "Comparison" chart, outlining a series of material inconsistencies between Mr. Bobb's plan and the requirements of the Settlement Agreement.

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Discrepancies between the Settlement Agreement and the proposed Monitoring Plan matter a great deal. Every provision in the Settlement Agreement was carefully considered and scrutinized to ensure that the overall Agreement will 1) address the essential constitutional concerns identified in DOJ's findings letter; 2) preserve the Police Department's ability to protect the public; and 3) responsibly manage City budget and resources. As chief law enforcement officer for the City, the Mayor is responsible for protecting all of these interests, and carrying out the Settlement Agreement as written.

The fact that the Monitor would submit a plan that clearly did not comply with the Settlement Agreement was alarming. Mr. Bobb's intent to extend the timelines for review of policies and training curricula set forth in the Agreement was of particular concern. The Settlement Agreement requires the Monitor to complete his review of policies and training materials within 45 days of receiving a draft. Mr. Bobb's plan indicates that he will delay approval of many policies and training curricula for 5 to 9 months, or more. We were concerned this would unnecessarily delay SPD's progress in implementing agreed reforms.

Over the last few weeks, we discussed with your office the best course of action for the City. We proposed that the City draft and offer an alternative plan that would faithfully comply with the Settlement Agreement, provide clear guidance to SPD, and serve the City's interests in pursuing prompt and effective implementation. You were critical of this approach even though you acknowledged problems in the Monitor's draft plan. You suggested your office might not support an approach that would potentially antagonize Mr. Bobb or DOJ, or lead to any public disagreement – and that this was the City Attorney's prerogative. It seemed your primary concern was not to advocate for the City's position, but rather to appease the Monitor and DOJ.

On Monday, February 25, you had a lengthy discussion with Bob Scales, SPD's Compliance Coordinator, in which he presented our alternate framework of a monitoring plan. As I believe you recognized, this proposal was logical, comprehensive, and faithful to the letter and spirit of the Settlement Agreement. You nevertheless indicated that you had concerns about this approach because it would be perceived as oppositional to Mr. Bobb and DOJ. You proposed that we instead offer an edited version of Mr. Bobb's proposal, and include our draft as an appendix.

After due consideration of your advice, and with the Mayor's approval, Chief Diaz provided our draft proposal to the Monitor. The next day, February 26, you sent a letter to the Monitor and DOJ undercutting the Chief's proposal. You stated that "as the City's attorneys," you believe that "*the Monitor's draft plan provides a starting point for collaboration on the plan and that SPD's desire for more specific guidance can be accomplished by adding an appendix to the Monitoring Plan.*" You attached to your letter your "suggested edits to the Monitor's draft plan" and "an alternative statement of the framework for setting specific goals and requirements for the Plan." The "alternative statement" was an earlier, substantially different version of Chief Diaz' proposal, which Mr. Scales had provided to you in confidence on February 22; you had simply removed the "Attorney-Client Privilege" designation, deleted a chart, and changed the date of the February 22 document. Your letter concluded with an invitation for Mr. Bobb to consider your proposal, rather than your client's, as the position of the City:

[I]f the Monitor would like to engage in discussions as suggested by SPD in Chief Diaz's letter, our office will assist in that process. If, however, the Monitor is

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inclined to reject SPD's approach, our office wanted to propose an alternate path for negotiation...

Needless to say, you did not consult with our office or SPD, or share any draft of your letter, before sending it. While you claimed you were representing the position of "the City," no City official authorized your action.

Meantime, sometime on Monday afternoon, without notice or consultation with your client, you and DOJ entered a stipulation to extend "the deadline by which the City must develop all policies and procedures contemplated within the Settlement Agreement." As the stipulation noted, any deadline to develop policies and procedures has not arisen, because the parties have not concluded discussion of a proposed Monitoring Plan. The stipulation included a statement that:

The Monitor has indicated to the Parties that he is agreeable to this short extension, although it does not in any way limit the Monitor's ability to submit a Monitoring Plan to the Parties, or should agreement not be reached, to the Court.

The implication of this statement was that the Monitor could ask the Court to approve his proposed Monitoring Plan if the City did not agree – which is not consistent with the Settlement Agreement.

Your refusal to support your client's proposal, and your submission of an alternate proposal, undermined your client's position. In negotiations on Tuesday, February 26, Mr. Bobb and DOJ were clearly interested in discussing your proposal, and relatively uninterested in the Department's approach. As the negotiations continued, we proposed a compromise approach that merged portions of Mr. Bobb's plan with our proposal. You insisted that you would not forward this proposal to the parties unless it included a cover note distinguishing between your edits and your client's ("attached is a draft that contains *the City Attorney's edits to the Monitoring Plan along with other edits and the framework is now in Section 6.*").

Aldo on Tuesday, after controversy regarding these interactions had arisen, the City Attorney was quoted telling a reporter, "I am concerned about the city getting on board and doing the job of reform." The implication of this statement – that SPD was not "on board" with the project of implementing the Settlement Agreement – was unfounded, untruthful, and totally contrary to the letter and spirit of Chief Diaz' own letter and proposal the day before. Indeed, Chief Diaz has expressed nothing other than an earnest desire to implement the Settlement Agreement.

Essentially, we are now engaged in a three-way negotiation – where the City's attorneys assert they have independent authority, and may take positions contrary to the Executive branch of government. This situation does not serve the City's interests. As Mr. Bobb reportedly told a group of officers on Tuesday night, "It seems like the City doesn't know who's on first base; they don't know who's in charge or what's going on."

This is not the first time we have had these sorts of disagreements. In 2011, you asserted that you had independent authority to bring a lawsuit on behalf of the City in *City of Seattle v. Protect Seattle Now*. The court ruled that you had no authority to initiate the action, without direction from the Mayor and City Council, because you had no client. You have since asserted that the court was wrong. In 2012, as we were in the midst of sensitive negotiations with the

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Department of Justice, you issued a letter denouncing the Mayor's approach, with the apparent goal of undercutting his ability to negotiate effectively on behalf of the City. Throughout our dealings with the DOJ, you have engaged in private communications with representatives of DOJ, and now, with Mr. Bobb, without sharing the content of these discussions. There is no doubt that you are working to advance the objectives of these parties, even (and especially) when they are contrary to the positions of your City clients.

We believe this course of conduct offends several provisions of the Washington Rules of Professional Conduct for attorneys.

- RPC 1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"
- RPC 1.4 provides in part: "A lawyer shall; (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent ... is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter ..."
- RPC 1.6 provides: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ..."
- RPC 1.13 provides: "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

We understand your position is that the Rules of Professional Conduct and established principles of the lawyer/client relationship do not apply to you because you are an elected official, and because the Seattle City Charter provides that the City Attorney has "full supervisory control" over the litigation of the City. In your view, this language gives you independent decision-making authority regarding the City's position in all matters related to court proceedings, including the implementation of the Settlement Agreement in this case. In essence, you assert that you may serve as both lawyer and client at the same time.

We do not believe the language of the City Charter confers the authority you claim. As the King County Superior Court recognized in the *Protect Seattle Now* case, the word "supervisory" means to "to oversee." The phrase "supervisory control" indicates that you are the manager of the Law Department, responsible for marshalling and supervising attorneys who represent the City in litigation. It does not, as you have claimed, establish that you are "co-equal with the mayor and city council," with ultimate decision-making authority regarding the City's position.

Further, implementation of the Settlement Agreement is not "litigation." The Agreement itself makes clear that it is an *agreement* between the City and the Department of Justice, entered in order to "avoid" litigation. (§§ 18, 214-228). Implementation of the agreement falls squarely within the Mayor's Charter authority under Art. V, Sec. 7:

The Mayor shall see that all contracts and agreements made with the City or for its use and benefit are faithfully kept and performed and to this end he or she shall cause any legal or equitable proceedings to be instituted and prosecuted. And it is the duty of every

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officer of the City having knowledge that any contract with the City has been violated by the other contracting party, forthwith to report the fact to the Mayor.

You have also frequently claimed that you serve as the attorney for "the City" or "the people," and are not bound to follow the direction of other elected City officials. But you do not have the ability to divine the position of the City, beyond directions given by the Legislative and Executive branches. Under your formula for City governance, "the City Attorney's position" becomes "the City's position." In cases where City officials differ from your proposed approach, they are left without any effective representation – or, worse, with a representative who is pursuing his own interests at the expense of theirs.

The example of the last week illustrates this problem. This is not, as you have suggested, merely a dispute about negotiating "strategy" – although if it were, you would still be obliged to follow your client's direction. We are at odds over the fundamental objectives of the negotiation. Our objective is to establish a monitoring plan that provides clear guidance to the Police Department in implementing the terms of the Settlement Agreement. Your objective has been to avoid, at all costs, a situation where you would be forced to publicly defend the Mayor and Police Department in a disagreement with the Department of Justice or Mr. Bobb, because this would not align with your personal agenda.

I want to emphasize that we have enjoyed excellent representation from many professional and highly capable attorneys in your office in a number of matters. So long as the positions of the City Attorney and Executive are aligned, the City Attorney works effectively as a traditional attorney – protecting confidences, providing legal advice, and representing the City's position. When we have a policy or strategic disagreement, however, problems follow.

At several points over the past few years, we have managed to resolve these sorts of conflicts by establishing an ethical screen, whereby a member of your office represents the Executive branch, and you are free to take your own positions. This approach has been effective in dealings with the Department of Justice.

- At the outset of the DOJ investigation in March 2011, you agreed that an informal screen was appropriate. While this screen was in place, we provided complete cooperation with DOJ, allowing DOJ to complete its investigation in near-record time.
- After the DOJ's findings letter was presented in December 2011, you asked and we agreed that you be included in negotiations with the DOJ regarding next steps. This period was marked by controversy, including leaks to the Seattle Times suggesting that the Mayor and Police Chief were opposed to police reform when they did not agree with your position as to how it should be accomplished.
- In May 2012, the Mayor traveled to Washington DC to meet personally with Thomas Perez of DOJ, and agreed on a framework for negotiations. The City Attorney was excluded from the mediation that followed. During the mediation, we were able to negotiate effectively, without controversy in the media, and we ultimately achieved a Settlement Agreement that has been praised by all sides.
- Following the Settlement Agreement, you took the position that there could be no direct contacts with the Executive and DOJ, and that all communications go through your

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office. This period is again marked by controversy, as you have privately and publicly challenged the Mayor's positions concerning the selection of a monitor, and now, agreement on a Monitoring Plan.

The pattern that has emerged is that when you are engaged in this matter, and disagreements arise, you work to characterize the Mayor as being opposed to police reform in order to advance your position.

Let us be perfectly clear: None of us supports police misconduct. We all want a police force that is respectful of constitutional rights, and effective in fighting crime. We are all committed to full and effective implementation of the Settlement Agreement in this case. We sometimes disagree on how best to achieve those objectives. In these cases, the Mayor welcomes good faith dialog about the best way to proceed. When that dialog is done, he needs to be able to assert positions on behalf of the City, without the ongoing opposition of the City's attorneys.

When we have raised these concerns with you in the past, you have asserted that it is unnecessary to resolve questions regarding your authority. You argue that uncertainties surrounding your role create a "healthy tension," which ensures that you and we must work together to decide a common position when disagreements arise. While this appears to work for you, it is not workable for the Executive branch. The Mayor and City Departments require legal counsel they can trust to represent their position on behalf of the City when conflicts arise. We need a City attorney who will protect our confidences and provide us with unbiased legal advice. Your unwillingness to provide this representation undermines the City's interests.

You are receiving under separate cover today a memo from the Mayor, summarizing his objectives and direction regarding next steps in this matter. Please let us know, in unequivocal fashion, whether you will accept this direction.

Meantime, we ask that you join us in seeking a declaratory judgment to resolve the scope of your authority in relation to both the City Charter and the Rules of Professional Conduct. Does the City Charter provide you with independent decision-making authority and eliminate the traditional attorney-client relationship between you and City clients, or not? Answering this question will allow our respective offices to work more effectively with one another, in accordance with the law, and will help to guide future administrations.

We look forward to discussing these issues with you at your earliest convenience.

Sincerely,



Carl Marquardt
Office of the Mayor